

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Scott Colton,)	
)	
Plaintiff,)	No. 2018 L 8534
)	
v.)	Commercial Calendar T
)	
Philip Jack Brooks,)	Judge Daniel T. Kubasiak
)	
Defendant.)	

OPINION

This cause is before the court on defendant Philip Jack Brooks' ("Brooks") motion to dismiss plaintiff Scott Colton's ("Colton") first amended complaint pursuant to 735 ILCS 5/2-615.

The court denies Brooks' section 2-615 motion to dismiss as to count I of the first amended complaint. The court finds that Colton has alleged that Brooks provided an offer that was sufficient at this stage to support an enforceable contract. The court grants defendant Brooks' motion to dismiss Colton's fraud claim as to count II without prejudice. The court finds that Colton has again failed to allege sufficient facts to establish Brooks' knowledge and intent in making the alleged misrepresentations.

BACKGROUND

The following is a brief summary of the allegations contained in the verified first amended complaint. Colton is a professional wrestler who publishes a weekly podcast series called The Art of Wrestling. On one episode of his podcast, Colton interviewed Brooks about his experiences as a wrestler with World Wrestling Entertainment ("WWE"). After Brooks' appearance, Amman sent a letter asserting that the episode had disseminated allegedly defamatory statements about Amman to the general public. This letter also demanded that Colton remove the episode and retract the allegedly defamatory statements. Colton notified Brooks of Amman's

letter, and Brooks allegedly said he would make sure Colton is “100% covered.” Colton claims that he did not comply with Amman’s demand letter in reliance on Brooks’ promise to cover him. Amman then filed a defamation action against Brooks and Colton, who both entered into a representation agreement with the law firm Loeb & Loeb (“Loeb”). Under this agreement, the parties allegedly agreed that Brooks would pay Loeb’s invoices.

Subsequently, Brooks allegedly demanded that Colton pay for some of Loeb’s services, and Colton “caused the Loeb Firm to be notified that Colton was prepared to retain separate counsel.” On June 1, 2016, Colton and Brooks’ mutual attorney, Sunny Brenner (“Brenner”), represented that he believed it was best that Colton not substitute counsel, and Colton accepted that Brenner would continue to represent the parties. According to Colton, Brooks later “caused the Loeb Firm to withdraw as Colton’s counsel” in Amman’s lawsuit, and Colton retained separate counsel to represent him in the action. Following a jury verdict in favor of Colton, Colton demanded reimbursement of fees and costs from Brooks, and Brooks allegedly refused said reimbursement. Colton’s verified complaint in this action alleges breach of contract (count I) and fraud (count II). The court previously dismissed both counts without prejudice.

STANDARD OF REVIEW

In a 2-615 motion to dismiss, the movant challenges the legal sufficiency of the pleadings based on certain defects or defenses apparent on the face of the complaint. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). In such a motion, all well-pled facts and their reasonable inferences must be taken as true and viewed in the light most favorable to the non-movant. *Jarvis v. S. Oak Dodge*, 201 Ill. 2d 81, 85 (2002). “A motion to dismiss should be granted only if the [claimant] can prove no set of facts to support the cause of action asserted.” *Kaiser v. Fleming*, 315 Ill. App. 3d 921, 925 (2d Dist. 2000). However, Illinois is a fact pleading jurisdiction; therefore, “a [claimant] must allege facts sufficient to bring a claim within a legally recognized cause of action.” *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351,

355 (2004). Mere conclusions of law and unsupported conclusory factual allegations are insufficient to survive a 2-615 motion to dismiss. *Alpha Sch. Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 736 (1st Dist. 2009). Colton's complaint alleges breach of contract (count I) and negligence (count II).

DISCUSSION

Breach of Contract (Count I)

The court previously held that Colton failed to allege facts sufficient to establish an offer, and that Colton failed to allege the existence of a bargained-for exchange of promises or performances so as to establish consideration. In the current motion, Brooks now argues that Colton "merely added conclusions of fact without any of the necessary specific factual allegations needed to survive a 2-615 motion." Contract formation requires the existence of an offer, an acceptance, and consideration. *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 65. A claimant must also allege the definite and certain terms of the parties' purported agreement. *Martusciello v. JDS Homes, Inc.*, 361 Ill. App. 3d 568, 575 (1st Dist. 2005). To establish his breach of contract claim against Brooks, Colton alleges that Brooks breached the indemnity agreement twice, alleging the following in the first amended complaint:

15. Colton notified Brooks of Colton's acceptance of Brooks' offer and agreement to cover 100% any and all liability, attorneys' fees and costs Colton might incur as a result of Colton's failure or refusal to comply with the demands in the Demand Letter, in consideration for which Colton agreed he would: (i) not comply with the demands contained in the Demand Letter and (ii) assist and cooperate with Brooks' defense in any related litigation against Brooks.

21. Consistent with the Indemnity Agreement, the signed retention agreement among Brooks, Colton and the Loeb Firm provides, inter alia, that the Loeb Firm "will bill (Brooks) for all of the legal services and expenses

that we incur with respect to the Amman Lawsuit" [Par. 2]. ***

48. Brooks breached each of the Indemnity Agreement and the Renewed Indemnity Agreement by failing to cover any of Colton's costs, expenses and attorney fees incurred in connection with defending against the claims made against Colton in the Amman Lawsuit after March 10, 2017.

The court previously found that "the representation that Brooks would be "100% covered" is not definite and certain enough to constitute an offer that could support an enforceable contract." Yet, Colton argues that while Brooks' initial promise that Colton would be "100% covered might be construed as vague," Brooks' June 1, 2016, offer and promise provided definite or certain enough terms to constitute an offer that could support and enforceable contract. On June 1, 2016, Brenner emailed Colton the following:

Despite your unwillingness to contribute to your legal fees, I am still prepared to represent you, and Phil is prepared to have me represent you and cover your legal fees going forward, as long as there is no conflict between you and Phil that prevents me from fairly and ethically representing you. At this time, I don't believe that any such conflict exists.

The court finds that that Brenner's email constituted an offer sufficient at this stage so as to establish that an enforceable contract exists between Colton and Brooks.

Regarding consideration, in paragraph 30 of Colton's first amended complaint, Colton alleges the following:

30. Colton again accepted the aforesaid offer and agreement made on Brooks' behalf in consideration for which Colton agreed to: (i) allow the Loeb Firm to continue to represent him in the Amann Lawsuit; (ii) not attempt to enter into a separate agreement terminating the Amann Lawsuit as to Colton; and (iii) continue to

assist and cooperate with Brooks' defense therein (the "Renewed Indemnity Agreement").

The court cannot inquire into the adequacy of this consideration to support a contract. *Chandra*, 2016 IL App (1st) 143858, ¶16. Therefore, the court cannot determine that Colton's non-compliance with Amman's demand letter or compliance with Brenner's email offer is not of sufficient value to constitute consideration. However, a promise to forego pursuit of a legal claim will be determined to be adequate consideration to support formation of a contract even if the claim is invalid, provided that it is asserted in good faith. *Kalis v. Colgate-Palmolive Co.*, 337 Ill. App. 3d 898, 900-901 (1st Dist. 2003). As such, the court finds that Colton has provided sufficient consideration "to support a claim for bargained-for exchange for a promise or performance." *In re Marriage of Hluska*, 2011 IL App (1st) 92636 (¶78).

Accordingly, because Colton has alleged sufficient facts to establish a breach of contract claim against Brooks, Brooks' motion to dismiss count I of Colton's first amended complaint is denied.

Fraud (Count II)

Brooks next maintains that Colton's first amended complaint again fails to plead "specific facts" required to allege fraud and relies on "further bare conclusions of fact." The elements of common law fraud are: (1) a false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the claimant to act; (4) action by the claimant in reliance on the statement's truth; and (5) damage to the claimant resulting from such reliance. *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980). A high standard of specificity is imposed on pleadings asserting fraud. *Chatham Surgicore, Ltd. v. Health Care Serv. Corp.*, 356 Ill. App. 3d 795, 803 (1st Dist. 2005). Specifically, the facts constituting fraud must be stated with sufficient specificity, particularity, and certainty to apprise the opposing party of what he or she is called upon to answer. *Miner v. Fashion Enters.*, 342 Ill. App. 3d 405, 419-20 (1st Dist. 2003). The claimant must allege specific facts establishing the elements of fraud, including "what misrepresentations were made,

when they were made, who made the misrepresentations, and to whom they were made.” *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989).

This court previously held the following:

Brooks also argues that Colton has failed to allege his fraud count with the heightened specificity required of fraud claims. Colton has alleged that Brooks represented Colton would be “100% covered” on December 16, 2014. Brooks also allegedly caused his attorney “to represent to Colton, on June 1, 2016, that Brooks would cover, and continue to cover, Colton’s legal fees and expenses incurred in defense of the claims contained in the Demand Letter and in the Amman Lawsuit.” The court finds that Colton has sufficiently alleged his fraud claim as to “what misrepresentations were made, when they were made, who made the misrepresentations, and to whom they were made.” *A, C & S, Inc.*, 131 Ill. 2d at 457.

Yet, the court then found that “Colton has not sufficiently pled other aspects of his fraud claim.” Specifically, the court found that “Colton’s allegations as to Brooks’ state of mind are conclusory and not sufficiently specific to support a fraud claim.” Brooks argues that Colton’s first amended complaint again “is void of any factual allegations establishing Defendant’s alleged mindset and instead merely asserts conclusions regarding Defendant’s knowledge and intent.”

In response, Colton argues that the first amended complaint addresses the issue of Brooks’ alleged mindset in paragraphs 53-56 and 66 of the complaint. Allegations of fraud must contain specific, directive manifestations of fraudulent intent. *Bank of Northern Illinois v. Nugent*, 223 Ill. App. 3d 1, 11 (2nd Dist. 1991). “Knew or should have known” allegations do not comport with the standards for pleading *scienter* and intent. *Id.* As the subject paragraphs of Colton’s complaint merely allege that “Brooks was advised and knew,” the court finds that Colton has again failed to allege the requisite “*scienter* and intent” to allege a successful fraud claim. *Id.*

Accordingly, the court grants Brooks’ 2-615 motion to dismiss without prejudice as to count II of the first amended complaint.

ORDER

It is ordered:

- (1) The court denies defendant Philip Jack Brooks' 2-615 motion to dismiss count I of plaintiff Scott Colton's complaint;
- (2) The court grants defendant Philip Jack Brooks' 2-615 motion to dismiss count II of plaintiff Scott Colton's complaint without prejudice;
- (3) Defendant is to answer or otherwise plead to plaintiff Scott Colton's first amended complaint by April 5, 2019;
- (4) This case is set for a report on status on April 9, 2019, at 9:30 a.m.

Judge Daniel J. Kubasiak

MAR 15 2019 

ENTERED,

Circuit Court - 2072

Judge Daniel J. Kubasiak, No. 2072